Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

PETER HOUSTON, PETITIONER

v.

ARAMARK CORPORATION; 1984 STOCK OPTION PLAN OF THE ARAMARK CORPORATION; ARAMARK OWNERSHIP PROGRAM AND ARAMARK; BENEFIT PLAN ADMINISTRATOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Third Circuit affirmed the district court decision which held that the stock option plan involved in this case was not an ERISA plan. Subsequent to the district court's decision, but prior to the Third Circuit's consideration of this case, the Court issued its opinion in *Yates v. Hendon*, 541 U.S. 1, 124 S.Ct. 1330, 158 L.Ed.2d 40 (March 2, 2004). *Yates* dealt with the basic issue as in our case, *i.e.*, the coverage provisions of ERISA applicable to the facts of each case. The Court in *Yates* discussed and relied on a Department of Labor Advisory Opinion which was directly applicable to the facts in that case. The Sixth Circuit opinion in *Yates* did not even mention the DOL Advisory Opinion. Reversing the Sixth Circuit, the *Yates* opinion states that the Department of Labor's view expressed in the Advisory Opinion "merits the Judiciary's respectful consideration." In this case, as in *Yates*, there is a DOL Advisory Opinion directly applicable to the facts. In his briefs filed with the Third Circuit, petitioner discussed the significance of the Court's precedent in *Yates* regarding the consideration to be given to an applicable DOL Advisory Opinion. The opinion of the Third Circuit did not mention either *Yates* or the applicable DOL Advisory Opinion. The question presented is as follows:

> Whether a Court of Appeals can ignore a Supreme Court case which directs that an applicable Department of Labor Advisory Opinion merits the Judiciary's "respectful consideration."

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OPINIONS BELOW

The Third Circuit's October 1, 2004 decision is reported as *Houston v. Aramark Corp.*, 112 Fed. Appx. 132, 2004 WL 2203981, C.A. 3 (Pa.), 2004. Neither the District Court opinion nor the Third Circuit's denial of Mr. Houston's petition for rehearing en banc are reported.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). The Third Circuit's Order and Opinion were filed on October 1, 2004 (1a). Mr. Houston's petition for rehearing *en banc* was denied on November 22, 2004 (15a).

STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act of 1974, §3(2)(A)(i), 29 U.S.C. §1002(2)(A)(i), provides in pertinent part that "the terms 'employee pension benefit plan' and 'pension plan' mean any plan, fund or program . . . established or maintained by an employer . . . to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program (i) provides retirement income to employees."

STATEMENT OF THE CASE

Facts

Peter Houston worked at Aramark for over 29 years as a management employee until he retired on June 1, 2001. Throughout that time, Aramark was a privately held corporation, the shares of which were not publicly traded. During his career there, Mr. Houston acquired shares of restricted Aramark stock through the company's stock option plans. He held those shares subject to the terms of Aramark's Stockholders' Agreement. The question was whether, under the "surrounding circumstances" here involved, the stock option plan can be viewed as an ERISA plan because of the specific provisions that provided retirement income.

Under the Stockholders' Agreement, an employee could sell his option shares only to Aramark or to a company-approved transferee, but neither Aramark nor any of its approved transferees had an obligation to buy his shares.

In the event of a shareholder's retirement however, the situation was different. Through a "put" mechanism in the Stockholders' Agreement, a stock option shareholder had the right to *require* the company to purchase 30% of his shares at the time of his retirement. In its Q & A section, the Prospectus explained this mechanism as follows:

> "Will I be able to require Aramark to repurchase my shares?
>
> "Generally, no. However, upon your death, complete disability, or normal retirement, you or your estate, as appropriate, and subject to our financing

> agreements, can require us to purchase up to 30% of your shares. This right to require us to purchase shares is described as a Put."

Under the Stockholders' Agreement, the company could call the shares of a stock option shareholder at any time during the decade following (but not before) such shareholder's last day of employment.

At the time of Mr. Houston's retirement, Aramark's top management knew that it was about to announce an initial public offering ("IPO") of its stock that would result in a substantial increase in the value of Mr. Houston's shares. Mr. Houston did not have this information.

Aramark was free to delay its call of Mr. Houston's shares until *after* its upcoming IPO announcement. But it chose, instead, to call those shares on June 14, 2001, before the IPO announcement, at the internal market price of $20.80 per share. The purchase of Mr. Houston's shares closed on June 29, 2001.

On July 17, 2001, Aramark announced its IPO and the value of a share of Aramark stock rose to $46. On the same day, in keeping with SEC rules, the company retroactively cancelled its internal market for the period from June 15, 2001 to July 17, 2001. This period included the June 29, 2001 closing on Mr. Houston's stock option shares. Aramark paid the $46 share price to other shareholders for stock it purchased on and after June 15, 2001. Accordingly, if Aramark had waited to call Mr. Houston's shares until after the IPO announcement, or if it had applied the same retroactive June 15, 2001 effective date to value Mr.

Houston's shares,[1] it would have paid him the market price of $46 per share, instead of the internally set price of $20.80 per share. In essence, Aramark made a bargain purchase of Mr. Houston's shares at Mr. Houston's expense.

Case History

Mr. Houston filed the case below on June 13, 2003. His Amended Complaint included a count under ERISA §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B), for review of Aramark's denial of his ERISA claim, thereby invoking the federal question jurisdiction of the District Court.

Aramark moved to dismiss Mr. Houston's Amended Complaint. On the ERISA claim, Aramark argued that its stock option plan was not an employee pension benefit plan as defined by ERISA. In our memorandum in opposition, we cited an on-point Department of Labor Advisory Opinion about a comparable stock option plan, which held that the plan *could* be an ERISA plan under the surrounding circumstances test, depending on the facts.

The district court granted Aramark's motion to dismiss on December 15, 2003. (10a-14a) Basing its decision on pre-*Yates* cases that reject ERISA coverage of stock option plans as a matter of law, it held that ERISA did not cover Aramark's stock option plan (13a). The district court gave no consideration to the

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[1] Aramark declined to apply the retroactive market cancellation date to its purchase of Mr. Houston's shares on the grounds that he had signed a release. However, the release was in exchange for an actuarially equivalent payout amount, so that he received no consideration for the release.

countervailing DOL Advisory Opinion. By ignoring the DOL Advisory Opinion, the district court precluded Mr. Houston from obtaining appropriate compensation -- approximately $3,000,000 at issue -- pursuant to ERISA. Mr. Houston filed a timely Notice of Appeal on January 12, 2003.

In an unpublished opinion filed on October 1, 2004, the Third Circuit affirmed the judgment of the district court (1a-9a). Although Mr. Houston argued to the Third Circuit that this Court's decision in *Yates v. Hendon* required it to give respectful consideration to the applicable DOL Advisory Opinion, the Third Circuit made no mention of *Yates*, and gave no consideration at all to the DOL Advisory Opinion.

Mr. Houston therefore petitioned the Third Circuit for rehearing *en banc* in light of *Yates*. The petition was denied on November 22, 2004 (15a).

REASONS FOR ALLOWANCE OF THE WRIT

REVIEW IS NECESSARY TO MAINTAIN THE HIERARCHY OF THE FEDERAL COURT'S SYSTEM WHICH REQUIRES THAT A COURT OF APPEALS MUST FOLLOW THE PRECEDENT OF A SUPREME COURT DECISION.

This petition for certiorari rests solely on the ground that the Third Circuit's opinion totally ignored this Court's holding in *Yates v. Hendon*, 541 U.S. 1, 124 S.Ct. 1330, 158 L.Ed. 2d 40 (March 2, 2004). In *Yates*, Justice Ginsburg stated the issue as follows:

> "This case concerns the definition and coverage provisions of Title I [of ERISA] . . . indicating who may participate in an ERISA-sheltered plan . . . ." 124 S.Ct. at 1336.

Both this case and *Yates* involve the same basic issue, *i.e.*, whether the coverage provisions of ERISA are applicable to the facts in each case. In *Yates*, there was an applicable Department of Labor Advisory Opinion which expressed the Department's position on ERISA coverage for the precise substantive issue involved in that case. In our case, there is also an applicable DOL Advisory Opinion which expressed the Department's position on ERISA coverage for the precise substantive issue involved in this case.

In *Yates*, the Sixth Circuit's opinion did not even mention the applicable DOL Advisory Opinion. Similarly, in our case the Third Circuit's opinion did not even mention the applicable DOL Advisory Opinion. But more importantly, *Yates* was not mentioned in the Third Circuit's opinion. The *Yates* decision was

explicitly discussed in the two briefs filed by petitioner with the Third Circuit. Both of petitioner's briefs also called specific attention to the DOL Advisory Opinion applicable to the precise situation presented to the Third Circuit. The DOL Advisory Opinion involved in our case (Advisory Opinion No. 90-17A) stated the Department's position that an employee stock option plan can be viewed as an ERISA pension plan, pursuant to ERISA's language,

> "to the extent that by its express terms *or as a result of surrounding circumstances such plan*, fund or program (i) provides retirement income to employees." ERISA §3(2)(A)(i), 29 U.S.C. §1002(2)(A)(i) (emphasis added)

This is the substantive issue in this case.

In *Yates*, Justice Ginsburg's opinion for the Court emphasized the importance of the DOL Advisory Opinion, as follows:

> "This agency view . . . reflects a 'body of experience and informed judgment to which, the courts and litigants may properly resort for guidance.'"

124 S.Ct. at 1342. Justice Ginsburg's opinion further stated:

> "This agency [Department of Labor] view, overlooked by the Sixth Circuit . . . *merits the Judiciary's respectful consideration.*"

Ibid. (emphasis added).

The Third Circuit ignored Justice Ginsburg's direction. Instead of "respectful consideration", the Third Circuit gave no consideration to the applicable DOL Advisory Opinion.

This failure of the Third Circuit to give "respectful consideration" to the DOL Advisory Opinion required by *Yates* directly conflicts with this Court's holding in *Hutto v. Davis*, 454 U.S. 370, 374-75, 102 S.Ct. 703, 706, 70 L. Ed. 2d 556 (1982):

> "More importantly, however, the Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress. Admittedly, the Members of this Court decide cases 'by virtue of their commissions, not their competence.' And arguments may be made one way or the other whether the present case is distinguishable, except as to its facts, from *Rummel* [the Supreme Court precedent]. But unless we wish anarchy to prevail within the federal judicial system, *a precedent of this Court must be followed by the lower federal courts* no matter how misguided the judges of those courts may think it to be." (emphasis added)

In our case, the Third Circuit ignored this Court's decision in *Yates* which prescribed "respectful consideration" to be given to an applicable Department of Labor Advisory Opinion on ERISA coverage. A lower federal court cannot overrule a decision of this

Court.[2] We respectfully submit that ignoring a decision of this Court is a far more egregious violation of this Court's constitutional authority and supervisory role than an opinion of a lower federal court which fails to follow a precedent of this Court on the grounds that the cases are distinguishable.

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[2] *Thurston Motor Lines, Inc. v. Jordon K. Rand, Ltd.*, 460 U.S. 533, 535, 103 S.Ct. 1343, 1344, 75 L.Ed. 2d 260 (1983): "Needless to say, only this Court may overrule one of its precedents. Until that occurs, *Rice* [precedent case there involved] is the law, and the decision below cannot be reconciled with it."

CONCLUSION

Petitioner respectfully requests that the Court order that the judgment of the Third Circuit is vacated and the case is remanded to the Third Circuit for further consideration in light of *Yates v. Hendon.*

Respectfully submitted,

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February 18, 2005

(any footnotes trail end of each document)

Case No: 04-1103
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETER HOUSTON,
Appellant

v.

ARAMARK CORPORATION; 1984 STOCK OPTION PLAN OF THE ARAMARK CORPORATION; ARAMARK OWNERSHIP PROGRAM AND ARAMARK; BENEFIT PLAN ADMINISTRATOR

September 30, 2004, Submitted Pursuant to Third Circuit LAR 34.1

October 1, 2004, Filed

NOTICE: RULES OF THE THIRD CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

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For ARAMARK, 1984 STOCK OPTION PLAN OF THE ARAMARK CORPORATION, ARAMARK OWNERSHIP PROGRAM AND ARAMARK, BENEFIT PLAN ADMN, Appellees: Steven R. Wall,

Amy R. Promislo, Morgan, Lewis & Bockius, Philadelphia, PA.

JUDGES: Before: RENDELL, FUENTES and SMITH, Circuit Judges.

OPINIONBY: SMITH
OPINION: OPINION OF THE COURT

SMITH, Circuit Judge.

Retired employee Peter Houston sued the Aramark Corporation, its 1984 Stock Option Plan, its Ownership Program, and the Aramark Benefit Plan Administrator (collectively, Aramark) after Houston learned that the company stock he sold to then-privately held Aramark roughly doubled in value approximately six weeks later upon the corporation's announcement of an initial public offering. Houston asserted two claims under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq, and one state common law claim. Aramark moved to dismiss Houston's amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), and the District Court dismissed all counts. For the reasons stated below, we affirm the judgment of the District Court.

The District Court had federal question jurisdiction over the ERISA claims, 28 U.S.C. § 1331, and supplemental jurisdiction over the state law claim, 28 U.S.C. § 1367. See Henglein, et al. v. Informal Plan for Plant Shutdown Benefits for Salaried Emples., 974 F.2d 391, 397-98 (3d Cir. 1992) (noting that once federal law is invoked, the facts alleged and their legal sufficiency are questions on the merits, and that "after disposal of a

federal claim, a district court has discretion to hear, dismiss, or remand a supplemental claim for which there is no independent basis for federal subject matter jurisdiction"). We have jurisdiction under 28 U.S.C. § 1291.

I. Background

Houston worked for Aramark for nearly thirty years before retiring from his executive position in June 2001. During his tenure, Houston entered into two stock option agreements with Aramark, the 1984 Stock Option Plan (1984 Plan) and the Aramark Ownership Program (ISPO). At the time of his retirement, Houston had amassed 117,602 shares, 18,224 through the 1984 Plan and 102,625 through the ISPO.

Both the 1984 Plan and the ISPO were intended to align the participants' interests with Aramark's. The "performance stock options" under the 1984 Plan were "designed to enable key ARA management to purchase shares of ARA Holding Company stock on terms that will give them a direct, sustained, and long-term interest in ARA's success." Similarly, the ISPO "provided selected management and other key employees opportunities to participate in the ownership of Aramark" and were generally granted "in connection with hires, promotions, and other forms of recognition of performance." (Emphasis added.)

As is common with such plans, the stock options awarded Houston by the board of directors allowed him to lock in a purchase price for the shares, and thus their upside potential, without assuming the risk that the shares would depreciate in value. If Aramark

prospered, the value of Houston's options would increase, and when certain conditions were met, Houston could purchase the shares at the lower options price set years before. Happily for all participants of the plans, Aramark did in fact prosper, and at the time of his retirement Houston's 117,000 shares were worth approximately $ 2,446,000. As suggested above, other participants, but not Houston, would soon become happier still.

Houston retired on June 1, 2001. Aramark was then still a privately held company, though going public had often been indicated as a possibility, in which case its shares would very likely appreciate considerably. n1 As part of his retirement planning, in May of 2001, Houston had met with Aramark's Benefits Director, Robert Bevilacqua. In that meeting the two discussed the possibility of Aramark going public. If he knew of it, Bevilacqua did not disclose that Aramark would soon announce its initial public offering. However, Bevilacqua suggested that Houston could postpone his retirement a year to see if Aramark would go public during that time. Houston declined.

Upon his retirement, the Stockholders' Agreement, which governed Houston's ownership of Aramark stock, allowed Aramark the right to repurchase, or "call," Houston's shares at their most recent appraisal price. Aramark called Houston's stock on June 14, 2001, indicating the appraisal price of $ 20.80 per share, a total of $ 2,446,121.60 for the 117,602 shares. On July 17, 2001, Aramark announced its initial public offering, which increased the value of Aramark stock to $ 46.00 per share. Since then, instead of seeing his $ 2.4m cup as overflowing, Houston has viewed his $ 5.4m cup as

less than half full. Houston's appeal to the Plan Administrator to recalculate the repurchase price to $ 46.00 was denied, and Houston, believing that Aramark breached its fiduciary obligations to him by withholding material information concerning the impending public offering, commenced this litigation.

The District Court applied this Court's decision in Oatway v. American International Group, Inc., 325 F.3d 184 (3d Cir. 2003) and determined that ERISA does not govern the stock option plans at issue because the retirement advantages offered in them are only incidental to their stated purposes of attracting and retaining key employees, and of aligning participants' interests with those of the corporation. The District Court also dismissed the common law breach of fiduciary duty claim on the grounds that Houston had waived Aramark's obligations by contract.

II. Standard of Review

We exercise plenary review in an appeal of a District Court's grant of a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Burnstein v. Ret. Account Plan for Emples. of Allegheny Health Educ. and Res. Found., 334 F.3d 365, 374 (3d Cir. 2003). "A motion to dismiss pursuant to Rule 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to the plaintiff, plaintiff is not entitled to relief." In re Burlington Coat Factory Litig., 114 F.3d 1410, 1420 (3d Cir. 1997). In considering this appeal, we do not examine whether Houston will ultimately prevail, but whether he is entitled to offer evidence in support of his

claims. See id.

III. Discussion

A. ERISA Claims

Houston asserted two causes of action under ERISA: (1) pursuant to 29 U.S.C. § 1132(a)(1)(B), wrongful denial of claimed benefits stemming from the Aramark's Plan Administrator's refusal to recalculate the repurchase price of Houston's shares, and (2) pursuant to 29 U.S.C. § 1132(a)(3), breach of fiduciary duty based on Aramark's nondisclosure of information regarding the impending announcement of an initial public offering. Determining whether Houston's stock options were incentive bonuses, or rather, deferred compensation subject to ERISA, determines Houston's two causes of action under ERISA.

ERISA defines "employee pension benefit plan" in 29 U.S.C. § 1002(2)(A) as "any plan, fund, or program . . . to the extent that by its express terms or as a result of surrounding circumstances" it (i) "provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond. . . ."

By their express terms the plans were designed to align key employees' interests with those of Aramark by giving the plans' participants a stake in the company. Houston, therefore, argues that the surrounding circumstances of the plans indicate that notwithstanding their stated purpose, the 1984 Plan and the ISPO nonetheless fall within ERISA's purview because they provide retirement income or result in

income deferred until participants' employment with Aramark ends or beyond.

The question is one of perspective. Houston essentially argues that because he intended to fund his retirement with the stock proceeds, and because the plans resulted in a deferral of a portion of his income to his retirement date and beyond, the plans meet ERISA's definition of "employee pension benefit plan." This interpretation cannot stand. As the Fifth Circuit noted in a leading case on ERISA's applicability to key employee bonus plans, "Any outright conveyance of property to an employee might result in some payment to him after retirement." Murphy v. Inexco Oil Co., 611 F.2d 570, 575 (5th Cir. 1980). The design of the plan at issue, not the individual participants' intended use of the proceeds, must be the perspective from which the definition of "employee pension benefit plan" is determined. See Oatway v. American International Group, Inc., 325 F.3d 184, 189 (3d Cir. 2003) [*9] ("We agree with the legal analysis of Murphy . . . and the unbroken line of cases that have followed Murphy's reasoning.").

So understood, Aramark's 1984 Plan and ISPO are not ERISA plans under the Department of Labor's interpretation, and the plans fall squarely within this Court's holding in Oatway. According to the Department of Labor regulations, "the terms 'employee pension benefit plan' and 'pension plan' shall not include payments made by an employer to some or all of its employees as bonuses for work performed, unless such payments are systematically deferred to the termination of covered employment or beyond, or so as to provide retirement income to employees." 29 C.F.R.

§ 2510.3-2(c). Though Aramark was a privately held corporation, and though the Stockholders' Agreement placed restrictions on the transferability of shares, the deferral of payment for shares from exercised stock options by 1984 Plan and ISPO participants was not systematic. It was simply Houston's choice not to sell his 117,000 shares before he retired, as evidenced by the fact that he indeed sold over 3,000 shares in 1999. That Houston's retirement triggered Aramark's option to call his shares does not change the analysis.

The District Court's determination that the plans here are not materially distinguishable from those in Oatway is correct. Oatway held that an incentive stock option plan with a stated purpose of "providing certain key employees . . . with additional incentive to continue their efforts on behalf of [the defendant corporations]" was not an ERISA plan. Oatway, 325 F.3d at 186, 189. As they were to Mr. Oatway, the stock options granted Houston "were discretionary, given in recognition of special service, and awarded in addition to his regular compensation." Id. at 189. Though Houston elected not to sell most of his exercised stock options before Aramark called them upon his retirement, the deferral was not systematic. n2 Therefore, Aramark's 1984 Plan and ISPO are not ERISA pension benefit plans.

B. State Fiduciary Duty Claim

The waivability of fiduciary duties owed by a majority shareholder to a minority shareholder is the issue that controls the state law claim. The District Court held that by consenting to the Stockholder's Agreement, Houston waived Aramark's duty to disclose future events which would impact the value of Houston's

shares. Under Delaware law, Aramark owed Houston fiduciary duties, Ivanhoe Partners v. Newport Mining Corp., 535 A.2d 1334, 1344 (Del. 1987), but those duties were amendable by contract. See Coleman v. Taub, 638 F.2d 628, 636 (3d Cir. 1981) (noting in the context of a corporate merger that a minority shareholder can "bargain away" his interests, thus eliminating the possibility of a breach of fiduciary duty).

Houston bargained away his right to the information specifically at issue here. Houston was a party to the Stockholder's Agreement, which states that at the time a shareholder sells his shares, there maybe proposed or pending an event or a transaction that could affect the Appraisal Price of the Common Stock, and that the Appraisal Price of the Common Stock (and, accordingly, the repurchase price) may be substantially less than the fair market value as of the current date, and further acknowledges and agrees that ARAMARK may have valid business reasons, and in any case shall not be required to, disclose any event or transaction that may have occurred or be proposed or pending at the time of any such sale.

It is difficult to imagine a clearer waiver of Aramark's duty to disclose the impending announcement of its initial public offering. The District Court correctly dismissed Houston's breach of duty claim. Because we conclude that Houston waived Aramark's duty to disclose future events, we need not address the issue of the effectiveness of Houston's release included in the Share Repurchase Agreement

NO. 03-3646
CIVIL ACTION

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PETER HOUSTON
Plaintiff,

v

ARAMARK CORPORATION, 1984 STOCK OPTION PLAN OF THE ARAMARK CORPORATION,: ARAMARK OWNERSHIP PROGRAM AND ARAMARK BENEFIT PLAN ADMINISTRATOR
Defendants.

ORDER

AND NOW, this day of December, 2003, upon consideration of the Defendants' Motion to Dismiss (Doc. 8), Plaintiff's Response, and the Parties' Replies, it is hereby ORDERED that said Motion is GRANTED. All counts of the Amended Complaint are DISMISSED for the reasons stated below.

To invoke the protections and duties of the Employee Retirement Income Security Act (""ERISA"), a plan must be "designed specifically to provide employees with medical, unemployment, disability, death, vacation, or other specified benefits or to provide income following retirement." Oatway v. American International Group, 2002 U.S. Dist. LEXIS 1771, *8-9 (E.D. Pa. 2002) ("Oatway I"), aff'd, 325 F.3d 184, 188 (3d

Cir. 2003) ("Oatway II"). Plans designed to compensate or retain employees that have retirement benefits only incidentally, are generally not governed by ERISA. Oatway II at 189 (Plaintiff's "post-retirement payments were only incidental to the goal of providing current compensation"). The statute dictates that a plan will be governed by ERISA if by its express terms, or by its surrounding circumstances, it can be determined that the plan was designed to provide the benefits described above.

Plaintiff claims that the Stockholder's Agreement, the Ownership Program, and the 1984 Stock Option Plan should be governed by ERISA because they meet the requirements of 29 U.S.C. § 1002(2) (A) (i) - the "retirement income" provision - by their express terms and under the surrounding circumstances. The Court disagrees.

At the outset, Plaintiff has included a Prospectus to the Stock Ownership Program ('"Program") in its exhibits (Amended Complaint Exhibit B), and refers to that Prospectus as evidence that the Program is designed to provide retirement income, thus qualifying as an ERISA plan under the "express terms" test.1 The Court refers Plaintiff to the materials following the Prospectus in his Exhibit B, evidently a shareholder statement. That document, on page 3, states that the 2001 Aramark Ownership Program "is not subject to any provisions of the Employee Retirement Income Security Act." Although not conclusive by any means, the Court does view this statement as evidence of Defendant's intent. Plaintiff also points to a provision in the 1984 Option Plan that alleviates certain burdens on share transfer upon death or retirement. Removing

these burdens upon retirement, however, is consistent with the stated goals of the Plan - to compensate key employees and encourage long term ownership; not simply to provide retirement income. Finally, none of the plans have retirement as an absolute condition of sale. The Court holds that the stock ownership arrangements do not, by their express terms, invoke ERISA.

The 1984 Stock Option Plan and the Ownership Program were designed to attract and retain key employees, and to give those employees a continuing stake in the success of the company (Amended Complaint Exhibits A, B). The purpose of the plans was to reward key employees; the fact that retirement allowed for more rapid disposal of some shares is only incidental to the purposes of the plans. The plans were not created for the purpose of giving employees retirement income, but rather for providing current compensation. Oatway II at 189.

Plaintiff makes a novel argument that the so-called "put" provisions of the Program require a break with Oatway. The "put" provision of the Program allows a participant to compel purchase of up to thirty percent of his shares upon death or retirement when certain conditions are met. The Court rejects Plaintiff's argument; the "put" provision may make it easier to sell Aramark shares following death or retirement, but it does not necessarily serve to increase the value of the shares, nor does it change the fact that retirement is not an absolute condition precedent to sale. A plan participant is free to sell the shares, with restrictions, before retiring. The Court finds the plans at issue offer retirement advantages that are only incidental to the

purpose of providing current compensation. Oatway I at *13-14 (while Plaintiff "may have been individually permitted to exercise his options subsequent to retirement, the primary purpose of the Plan as a whole was to provide additional benefits to employees during the course of their employment."). This Court will not break with the long line of courts that have refused to find that ERISA governs stock incentive plans. See Oatway II at 189. As Claims I and II require ERISA coverage to proceed, those claims are hereby dismissed.

Plaintiff's breach of duty claim must also be dismissed. Delaware, unlike other states, allows the duties running from a majority shareholder to a minority shareholder to be modified by contract. By consenting to the Stockholder's Agreement, it is quite clear that Plaintiff waived Defendant's duty to disclose future events. The Court also holds that Plaintiff released any claims he may have had against Defendant when he signed the Repurchase Agreement2

AND IT IS SO ORDERED.

Clarence C. Newcomer, S. J.

Fn1Plaintiff actually cites the prospectus as evidence that the Stockholder's Agreement is covered by ERISA; the Court assumes that Plaintiff meant to refer to the Plan in this sentence, although the Court's reasoning would not change regardless of the document Plaintiff intended to refer to.

Fn2This Court will not engage in an analysis of the validity of the Repurchase Agreement with respect to

potential ERISA claims, which as the Parties have agreed would invoke heightened scrutiny.

Case No: 04-1103
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FOR THE THIRD CIRCUIT

PETER HOUSTON,
Appellant

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ARAMARK CORPORATION; 1984 STOCK OPTION PLAN OF THE ARAMARK CORPORATION; ARAMARK OWNERSHIP PROGRAM AND ARAMARK; BENEFIT PLAN ADMINISTRATOR

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision. of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majoity of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is denied.

November 22, 2004

(2)

APR 4 - 2005

No. 04-1178

In The

Supreme Court of the United States

PETER HOUSTON,

Petitioner,

v.

ARAMARK CORPORATION, 1984 STOCK OPTION PLAN OF THE ARAMARK CORPORATION, ARAMARK OWNERSHIP PROGRAM AND ARAMARK BENEFIT PLAN ADMINISTRATOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether this Court should deny the writ of certiorari where the Third Circuit Court of Appeals, consistent with the decision of every Circuit Court of Appeals to consider the issue and with the Department of Labor's articulated analytical framework, correctly concluded that the stock option incentive plans in this action were not "employee pension benefit plans" subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461?

SUPREME COURT RULE 29.6 STATEMENT

Respondent ARAMARK Corporation makes the following disclosures:

1) ARAMARK Corporation has no parent corporation.

2) No publicly held companies hold 10% or more of ARAMARK Corporation's stock.

3) No publicly held companies that are not a party to the proceeding before this Court have a financial interest in the outcome of the proceeding.

Respondents 1984 Stock Option Plan of the ARAMARK Corporation, ARAMARK Ownership Program, and ARAMARK Benefit Plan Administrator are not corporate entities.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, ARAMARK Corporation, 1984 Stock Option Plan of the ARAMARK Corporation, ARAMARK Ownership Program, and ARAMARK Benefit Plan Administrator, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Third Circuit Court of Appeals' unpublished opinion in this case.

COUNTER-STATEMENT OF THE CASE

On June 1, 2001, Petitioner Peter Houston voluntarily retired from his employment with Respondent ARAMARK Corporation ("ARAMARK" or the "Company"). ARAMARK awarded certain employees, including Petitioner, stock options under the 1984 Stock Option Plan of the ARAMARK Corporation (the "1984 Plan") and the Installment Stock Purchase Opportunities of the ARAMARK Ownership Program (the "Ownership Program"; and together with the 1984 Plan, the "Plans"). The options gave these employees, including Petitioner, the right to purchase a set number of shares of ARAMARK stock at a set price as provided for in the Plans. Exercising his options under the Plans over a period of time, Petitioner purchased a total of 120,849 shares of ARAMARK common stock.[1] As a condition of purchase, Petitioner adopted the Amended and Restated Stockholders' Agreement of ARAMARK Corporation (the "Stockholders' Agreement").

[1] During his employment, Petitioner sold 3,247 shares, leaving him with 117,602 shares of ARAMARK common stock at the time of his retirement.

The Stockholders' Agreement governed every aspect of Petitioner's ownership of ARAMARK stock. Relevant to this action, the Stockholders' Agreement granted ARAMARK the right to repurchase Petitioner's shares upon the termination of his employment at the then-current Appraisal Price.[2] Additionally, the Stockholders' Agreement explicitly limited ARAMARK's duty to disclose pending or proposed transactions that could affect the Appraisal Price and repurchase price of Petitioner's shares.

Petitioner's voluntary retirement triggered the Company's buy-back right. At the time he retired, Petitioner knew that ARAMARK had previously indicated that a public offering of its shares was a possibility.[3] Moreover, before Petitioner retired, ARAMARK's Benefits Director, Robert Bevilacqua, suggested to Petitioner that he wait a year before retiring to see if a public offering occurred.

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[2] The Stockholders' Agreement defines Appraisal Price as "the fair market value of [Common Stock], as determined by an Appraiser according to the most recent existing appraisal of shares of Common Stock, which appraisal shall be as of a date not more than six months prior to the use thereof" and states that "[the] determination by the Appraiser shall be conclusive and binding on all Stockholders and ARAMARK." Moreover, the "Appraiser" is independent of ARAMARK, and is defined as a firm headquartered in the United States with recognized national standing in the business of valuation of securities.

[3] Petitioner incorrectly contends that ARAMARK's top management "knew that it was about to announce an initial public offering (IPO) of its stock that would result in a substantial increase in the value of [Petitioner's] shares" and that "[Petitioner] did not have this information." (Pet. at 3.) Petitioner does not plead in his Amended Complaint that ARAMARK's management knew that the Company was about to announce an IPO at the time Petitioner retired. Moreover, at the time of his retirement, Petitioner knew that ARAMARK had previously indicated that an IPO was a possibility.

Petitioner rejected Mr. Bevilacqua's specific advice to wait a year before retiring to see if an IPO occurred.

Upon Petitioner's retirement, ARAMARK exercised its buy-back right, calling Petitioner's shares on June 14, 2001 at the Appraisal Price of $20.80 per share (for a total purchase price of $2,446,121.60).[4]

On July 17, 2001, ARAMARK announced a proposed IPO of Company stock, which did not occur until December 2001. At the time of closing of the IPO in December 2001, the stock traded at $46 per share.[5] Because Petitioner had retired effective June 1, 2001, and because he had sold to ARAMARK all of his shares under the precise terms of a Repurchase Agreement, he owned no shares as of the time of the IPO. Nearly two years later, obviously disappointed in his own voluntary decision to retire, Petitioner filed his Complaint in District Court, alleging that ARAMARK denied him benefits under the Plans and breached its common law and ERISA fiduciary duties by failing (allegedly) to disclose the impending IPO of ARAMARK stock.

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[4] Petitioner incorrectly contends that ARAMARK "declined to apply the retroactive market cancellation date to its purchase of [Petitioner's] shares on grounds that he had signed a release" and that "he received no consideration for the release." (Pet. at 4 n.1.) Petitioner did execute a Release, which serves as a bar to all of his claims. However, irrespective of the Release, ARAMARK had no legal duty to purchase Petitioner's shares at the post-IPO share price. Moreover, contrary to Petitioner's contention that he received no consideration for the Release, the District Court specifically upheld the validity of the Release and held that it barred Petitioner's state law claims. (Pet'r App. at 13a.) Petitioner's suggestion that the Release is invalid for lack of consideration should be disregarded.

[5] Petitioner incorrectly contends that the stock price increased to $46 per share immediately upon ARAMARK's announcement of the proposed IPO on July 17, 2001. (Pet. at 3.)

ARAMARK moved to dismiss Petitioner's claims on three independent grounds, contending that: (1) the stock option plans on which Petitioner based his ERISA claims were not "employee benefit plans" within the meaning of ERISA, and thus ERISA did not govern claims for benefits under those plans; (2) Petitioner had executed a broad Release of all of his claims in exchange for accelerated payment of his stock value; and (3) Petitioner unequivocally waived any right he may have allegedly had to receive information relating to ARAMARK's consideration of a potential IPO prior to his retirement, and thus his breach of fiduciary duty claims failed as a matter of law. On December 15, 2003, the United States District Court for the Eastern District of Pennsylvania dismissed all of Petitioner's claims with prejudice, on all three independent grounds. (Pet'r App. at 13a.)

Petitioner appealed the decision to the Third Circuit Court of Appeals, which rendered its ruling on October 1, 2004. The Third Circuit Court of Appeals affirmed the District Court's holding that the Plans are not ERISA benefit plans and that Petitioner failed to state a claim for breach of fiduciary duty under state law because he waived his right to receive information about future corporate events, including an IPO.[6] (Pet'r App. at 8a-9a.)

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[6] The precedential value of the Third Circuit Court of Appeals' decision in this case is severely limited by the fact that it is an unpublished disposition and prominently states at the top of the decision that it is "NOT PRECEDENTIAL." *See Houston v. ARAMARK Corp.*, No. 04-1103, 112 Fed. Appx. 132, 2004 WL 2203981 (3d Cir. Oct. 1, 2004) (emphasis in original). The copy of the decision appended to Petitioner's brief conveniently leaves out the "NOT PRECEDENTIAL" notation that is included on the original opinion and every other copy of the decision.

The Third Circuit Court of Appeals denied Petitioner's Petition for Rehearing En Banc and for Panel Rehearing, Pursuant to Rules 35(b) and 40(a)(2), Fed. R. App. P., on November 22, 2004. (Pet'r App. at 15a.)

REASONS FOR DENYING THE WRIT

In its decision below, the Third Circuit Court of Appeals, consistent with the opinion of every Circuit Court of Appeals to consider the issue, held that the stock option incentive plans in this case do not constitute ERISA pension plans.[7] Contrary to Petitioner's contention, the Department of Labor Advisory Opinions do not support his argument, nor do they conflict with the position of the Third Circuit Court of Appeals. Moreover, the plain language of the statute, combined with regulations promulgated by the Department of Labor, leaves no doubt that the position of the Third Circuit Court of Appeals is correct. Because the Third Circuit Court of Appeals correctly resolved the issues before it, there are no special or important reasons for granting review of this matter, as required by Rule 10 of this Court's Rules.

[7] As discussed more fully below, Section 3(2)(A) of ERISA defines an "employee pension benefit plan" as a plan that "by its express terms or as a result of surrounding circumstances . . . provides retirement income to employees, or . . . results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." 29 U.S.C. § 1002(2)(A)(i)-(ii).

I. The Department Of Labor Advisory Opinions Do Not Support Petitioner's Claim That The Plans Constitute ERISA Plans And Petitioner's Attempt To Suggest Otherwise Is Wholly Contrived.

Petitioner represents to this Court that there is "an applicable DOL Advisory Opinion which expressed the Department's position on ERISA coverage for the precise substantive issue involved in this case" and that the Third Circuit Court of Appeals erred in failing to acknowledge the Advisory Opinion. (Pet. at 6.) Neither of the Advisory Opinions Petitioner relies on support his argument, nor do the Advisory Opinions conflict with the position of the Third Circuit Court of Appeals in this case. Indeed, in both of the Advisory Opinions cited by Petitioner, the Department of Labor opined that the plans at issue were **not** ERISA pension plans under the "express terms" test. Adv. Op. 98-02A, 1998 WL 103654 (Dep't of Labor, Mar. 6, 1998); Adv. Op. 90-17A, 1990 WL 263441 (Dep't of Labor, Oct. 25, 1990). Moreover, the Department of Labor explicitly refused to opine on whether a plan constituted an ERISA pension plan under the "surrounding circumstances" test:

> The question of whether a plan, find [sic], or program is a pension plan as a result of surrounding circumstances is inherently factual in nature, and generally the Department does not issue advisory opinions on such questions.

Adv. Op. 98-02A, 1998 WL 103654, at *2. *See also* Adv. Op. 2002-13A, Pens. Plan Guide (CCH) P 19,989H, 2002 WL 31846478 (Dep't of Labor, Dec. 6, 2002) (same); Adv. Op. 90-17A, 1990 WL 263441 (refusing to opine on whether a stock option plan constitutes an ERISA pension plan

under the surrounding circumstances test due to the inherently factual nature of the determination).

Incredibly, relying on the same Advisory Opinions he cites to this Court, Petitioner previously admitted in the District Court that "[b]ecause of the fact-sensitive nature of the 'surrounding circumstances' test, the Department of Labor refuses to issue advisory opinions as to whether a particular stock option or bonus program should be considered an ERISA pension plan." (Pl.'s Mem. in Opp'n to Defs.' Mot. to Dismiss the Amended Compl. at 13.) Having previously conceded that the Department of Labor refused to opine on whether a stock option plan is an ERISA pension plan, which is the dispositive issue in this case, Petitioner's contention that the Third Circuit Court of Appeals erred in overlooking "applicable" Department of Labor Advisory Opinions is specious at best.

Moreover, consistent with the analysis employed by the Department of Labor in its Advisory Opinions,[8] the Third Circuit Court of Appeals devoted over two full pages of its opinion to whether the circumstances surrounding the Plans in this case rendered the Plans ERISA pension plans, and correctly decided that the circumstances did not warrant such a conclusion. (Pet'r App. at 6a-8a; *see also infra* Section II.) There being no Department of Labor Advisory Opinions that conflict with the Third Circuit

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[8] In its Advisory Opinions, the Department of Labor explained that a plan may be an ERISA pension plan as a result of surrounding circumstances, "if payments under a plan are, in operation, systematically deferred until the termination of employment or retirement age." Adv. Op. 98-02A, 1998 WL 103654, at *3; *see also* Adv. Op. 90-17A, 1990 WL 263441.

Court of Appeals' conclusion, the Court should deny the Petition.[9]

II. The Third Circuit Court Of Appeals Fully Considered The Issues And Correctly Decided That The Plans Are Not ERISA Pension Plans, Consistent With The Opinion Of Every Circuit Court Of Appeals To Consider The Issue.

In the decision below, the Third Circuit Court of Appeals, consistent with the opinion of every Circuit Court of Appeals to consider the issue, correctly concluded that the Plans do not constitute pension benefit plans under ERISA. (*See* Pet'r App. at 7a-8a.)

ERISA defines an "employee pension benefit plan" as a plan that "by its express terms or as a result of

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[9] Petitioner's contention that the Third Circuit Court of Appeals ignored "a Supreme Court case which directs that an applicable Department of Labor Advisory Opinion merits the Judiciary's 'respectful consideration'" is a red herring. First, as explained above, the Department of Labor Advisory Opinions do not support Petitioner's position. Second, Petitioner overstates the deference owed to Department of Labor Advisory Opinions. In *Christensen v. Harris County*, 529 U.S. 576, 586-88 (2000), the Court specifically addressed the level of deference owed to a Department of Labor Advisory Opinion. After careful analysis, the Court held that opinion letters are "'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade.'" *Id.* at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The Court rejected the contention that Advisory Opinions should be afforded the same heightened deference owed to agency regulations under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In this case, the Advisory Opinions on which Petitioner relies lack any persuasive power as the Department of Labor specifically declined to opine on the issue at hand, *i.e.*, whether a stock option incentive plan constitutes an employee benefit plan under ERISA.

surrounding circumstances . . . (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." 29 U.S.C. § 1002(2)(A)(i)-(ii).

Petitioner does not dispute the Third Circuit Court of Appeals' holding that "[b]y their express terms the plans were designed to align key employees' interests with those of Aramark [sic] by giving the plans' participants a stake in the company." (Pet'r App. at 6a; Pet. at 2.) Rather, the gravamen of Petitioner's claim is that "under the 'surrounding circumstances' here involved, the stock option plan can be viewed as an ERISA plan." (Pet. at 2.) Petitioner contends that because he "intended to fund his retirement with stock proceeds, and because the plans resulted in a deferral of a portion of his income to his retirement and beyond, the plans meet ERISA's definition of 'employee pension benefit plan.'" (Pet'r App. at 7a.)

The Third Circuit Court of Appeals rejected Petitioner's contention. (*Id.*) The Third Circuit Court of Appeals aptly observed that "[a]ny outright conveyance of property to an employee might result in some payment to him after retirement." (*Id.*, quoting *Murphy v. Inexco Oil Co.*, 611 F.2d 570, 575 (5th Cir. 1980).) *See also Oatway v. Am. Int'l Group, Inc.*, 325 F.3d 184, 188 (3d Cir. 2003) ("[T]he mere fact that some payments under a plan may be made after an employee has retired or left the company does not result in ERISA coverage by statutory definition."); *Emmenegger v. Bull Moose Tube Co.*, 197 F.3d 929, 933 (8th Cir. 1999) ("[T]hough the [plan's] vesting requirement could result in the deferral of a portion of any earned incentive until a participant's termination or retirement . . . such a deferral would only occur by

happenstance."), *cert. denied*, 540 U.S. 947 (2003); *McKinsey v. Sentry Ins.*, 986 F.2d 401, 406 (10th Cir. 1993) (same).

The Third Circuit Court of Appeals further explained that "[t]he design of the plan at issue, not the individual participants' intended use of the proceeds, must be the perspective from which the definition of 'employee pension benefit plan' is determined." (Pet'r App. at 7a (internal citation omitted).) Here, as the Third Circuit Court of Appeals observed, the Plans served as reward and incentive programs, not as a tool for systematically deferring income past termination of employment. (*See* Pet'r App. at 8a.) The 1984 Plan explicitly states that:

> ARA Performance Stock Options are designed to enable key ARA management to purchase shares of ARA Holding Company stock on terms that will give them a direct, sustained, and long-term interest in ARA's success.

Likewise, the Ownership Program states that its purpose is:

> to enable ARAMARK Corporation . . . to continue to compete successfully in attracting and retaining key employees by making it possible for them to purchase shares of the Company's Common Stock on terms which will give them a more direct and continuing interest in the future success of the Company's business.

The Ownership Program provides further that "[i]ndividual grants are generally made in connection with hires, promotions, and other forms of recognition of performance." Thus, as the Third Circuit Court of Appeals properly concluded, ARAMARK intended for the Plans to provide an incentive

for "key employees" to remain with ARAMARK and to reward their performance, not to provide them with retirement income. (*See* Pet'r App. at 8a ("[T]he plans were designed to align key employees' interests with those of ARAMARK by giving the plans' participants a stake in the company.").) As such, the Plans do not meet the definition of an employee benefit plan under ERISA. (*See id.*) *See also Oatway*, 325 F.3d at 189 (holding that a stock option incentive plan was not subject to ERISA because it was "not created for the purpose of providing retirement income, but rather was an incentive plan designed to provide financial incentive for employees to remain with [the company] and improve their performance there"); *Emmenegger*, 197 F.3d at 932-33 (holding that phantom stock plan was not subject to ERISA where the stated purpose of the plan was to ensure continuity of management of the corporation and the plan "*relates awards to service* to the Corporations") (emphasis in original); *Murphy*, 611 F.2d at 575 (holding that ERISA governs only those plans that are "designed for the purpose of paying retirement income whether as a result of their express terms or surrounding circumstances").

The Third Circuit Court of Appeals also found support for its conclusion that the Plans were not subject to ERISA in the regulations promulgated by the Department of Labor to clarify the limits of the terms "employee pension benefit plan" and "pension plan." (Pet'r App. at 7a.) The Department of Labor's regulations specifically exclude from the definition "payments made by an employer to some or all of its employees as bonuses for work performed, unless such payments are systematically deferred to the termination of covered employment or beyond, or so as to provide retirement income to employees." (Pet'r App.

at 7a, quoting 29 C.F.R. § 2510.3-2(c).) Noting that Petitioner sold over 3,000 shares prior to his retirement, the Third Circuit Court of Appeals concluded that the deferral was not systematic, notwithstanding Petitioner's election "not to sell most of his exercised stock options before Aramark [sic] called them upon his retirement." (Pet'r App. at 8a.)[10] Thus, the Third Circuit Court of Appeals correctly concluded that the Plans did not systematically defer payments to provide retirement income, and therefore did not satisfy the definition of an ERISA pension plan. (*Id.*) *Accord Emmenegger*, 197 F.3d at 933 (holding that phantom stock plan did not systematically defer benefits to provide retirement income where evidence showed that certain participants redeemed shares while still employed by the company); *McKinsey*, 986 F.2d at 406 (holding that plan that permitted employee to "defer payment . . . until the termination of employment or to provide retirement income" was not an ERISA-covered plan because plan permitted employee to withdraw allocations during the course of employment as well, and therefore did not provide for the "systematic deferral of payment"); *Murphy*, 611 F.2d at 575-76 (holding that

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[10] Petitioner's argument that the "put" provision in the Stockholders' Agreement, which under certain circumstances allows a stockholder to compel ARAMARK to purchase up to thirty percent of his shares upon death or retirement, converts it into an ERISA plan has no merit. As the District Court properly recognized:

> [T]he "put" provision may make it easier to sell ARAMARK shares following death or retirement, but it does not necessarily serve to increase the value of the shares, nor does it change the fact that retirement is not an absolute condition precedent to sale. A plan participant is free to sell the shares, with restrictions, before retiring.

(Pet'r App. at 12a.)

payments were not systematically deferred to the termination of covered employment or beyond or so as to provide retirement benefits where plan was "designed to provide current rather than retirement income" to employees, notwithstanding that some of the proceeds "might be paid to an employee after he had retired or otherwise left [the company]").

Five Circuit Courts of Appeals (including the Third Circuit Court of Appeals) have uniformly and categorically rejected claims similar to Petitioner's contention that stock option incentive plans or other similar arrangements are ERISA pension plans where the plans were not designed to provide retirement income or systematically defer payments until termination of employment. *See Oatway*, 325 F.3d at 189 (holding that a stock option incentive plan was not an employee benefit plan under ERISA); *Estate of McLoone v. Intel Corp.*, No. 99-35559, 2001 WL 32067, at *1 (9th Cir. Jan. 12, 2001) (unreported) (holding that stock option agreements were not employee benefit plans under ERISA); *Emmenegger*, 197 F.3d at 933 (holding that phantom stock plan was not an ERISA pension plan); *McKinsey*, 986 F.2d at 405-06 (holding that bonus plan was not an ERISA pension plan because it did not provide for the systematic deferral of payment); *Murphy*, 611 F.2d at 574-76 (holding that stock option incentive plans were not employee benefit plans under ERISA). No federal appellate court has held to the contrary. Accordingly, there is no compelling reason for the Court to expend its valuable but very limited resources to address Petitioner's claim.

In sum, the Third Circuit Court of Appeals correctly held that the Plans are not ERISA pension plans. Accordingly, this Court should deny the petition for writ of certiorari.

III. The Court Should Deny The Petition Because Petitioner Released His Claims.

Even assuming *arguendo* that ERISA governs the Plans, Petitioner executed a Release that bars his claims. In consideration for receiving accelerated payments for his shares, Petitioner released Respondents from:

> any and all manner of actions, suits, proceedings, claims and demands of any kind or character whatsoever, at law or in equity, in any way directly or indirectly related to or connected with all purchase opportunities and options, if any, and in connection with the issuance, purchase and repurchase of the Shares, including, but not limited to claims relating to . . . any and all suits in tort or breach of contract, as well as any and all claims for additional compensation or damages, except for ARAMARK's obligation set forth in Section 8.02 of the Stockholders' Agreement, and except for the obligations set forth in the Note. You agree that you will not file a lawsuit to assert any such claim.

(Compl. Ex. D at 35.) Petitioner claims that he is entitled to "a recalculation of the price of his repurchased shares at $46.00 per share" and that he is entitled to "restitution of [his] ARAMARK stock shares . . . so that they are subject to repurchase by ARAMARK at the price of $46.00 per share." Thus, Petitioner seeks "additional compensation or damages" "related to or connected with . . . the issuance, purchase and repurchase of the Shares." As demonstrated below, the Release bars Petitioner's claims, warranting dismissal of his purported ERISA claims.

It is well settled that a benefit plan participant may release an ERISA claim by entering into the release

voluntarily and with knowledge of its terms. *See Lawson v. Consol. Rail Corp.*, No. Civ. A. 97-7206, 1999 WL 171431, at *3 (E.D. Pa. Mar. 29, 1999); *Feret v. First Union Corp.*, No. Civ. A. 97-6759, 1999 WL 80374, at *5 (E.D. Pa. Jan. 25, 1999); *Bennett v. Independence Blue Cross*, No. Civ. A. 92-4249, 1993 WL 15603, at *2 (E.D. Pa. Jan. 13, 1993). To determine whether a participant knowingly and voluntarily released his claims, courts apply a "totality of the circumstances" test, which incorporates the following seven factors: (1) the clarity and specificity of the release language; (2) the plaintiff's education and business experience; (3) the amount of time the plaintiff had for deliberation before signing the release; (4) whether the plaintiff knew or should have known his rights upon execution of the release; (5) whether the plaintiff was given the opportunity to consult with an attorney before signing the release; (6) whether there was an opportunity for negotiation of the terms of the agreement; and (7) whether the plaintiff received adequate consideration for the release. *Lawson*, 1999 WL 171431, at *3; *Feret*, 1999 WL 80374, at *5. *See also Leavitt v. Northwestern Bell Tel. Co.*, 921 F.2d 160, 162 (8th Cir. 1990).

Petitioner's execution of the Release satisfies each element of the totality of the circumstances test. First, the language of the Release clearly and unambiguously discharges *any claim* relating to the "issuance, purchase and repurchase" of Petitioner's shares of ARAMARK stock. *Cf. Bennett*, 1993 WL 15603, at *2 (holding that a release of "any and all claims . . . arising out of my employment and termination therefrom" was clear and specific). Second, Petitioner is an attorney, and his depth of business experience and his legal education clearly satisfy the "minimal threshold" of the totality of the circumstances

test. *Id.* (a high school diploma and twenty years of experience as a computer programmer satisfied education and experience factor). *See also Leavitt*, 921 F.2d at 163 (experience as a management employee satisfied test).

Third, the Release specifically provided Petitioner with twenty-one days to consider its terms, and specifically advised Petitioner that by executing the Repurchase Agreement within the allotted period, "you agree that your decision to do so was knowingly and voluntarily made." (Compl. Ex. D.)[11] Courts have held that shorter periods of time satisfy the knowing and voluntary test. *See, e.g.*, *Leavitt*, 921 F.2d at 163 (eleven days sufficient); *Bennett*, 1993 WL 15603, at *3 (eight days was "ample" time to deliberate). Fourth, the Release specifically advised Petitioner that he would be releasing Respondents from "any and all manner of actions, suits, proceedings, claims and demands of any kind whatsoever . . . in any way . . . connected with the issuance, purchase and repurchase" of his shares. (Compl. Ex. D at 35.) At the time he signed the Release, Petitioner knew that he could miss out on the benefits of a subsequent public offering. (*See* Compl. ¶ 13.) Indeed, he candidly admits in the Amended Complaint both that he discussed with Mr. Bevilacqua that an IPO was a real possibility, and that Mr. Bevilacqua advised him to wait one year to retire just in case there was an IPO in that year. (*Id.*) Rejecting this advice, and with full knowledge of his rights, Petitioner chose to receive more

[11] The Release further granted Petitioner an additional seven-day window following his execution of the Repurchase Agreement to revoke the Release. (*See* Compl. ¶ 18, Ex. D at 35 ("You also have the right for a period of seven days following your execution of this Repurchase Agreement . . . to revoke this Repurchase Agreement.").)

money up front and accelerated payments in exchange for releasing Respondents from *any claims* relating to the "issuance, purchase and repurchase" of his shares.

Fifth, ARAMARK specifically encouraged Petitioner to consult with counsel before signing the Release and provided ample opportunity for him to do so: "[y]ou are encouraged to consult with your attorney prior to execution of this Repurchase Agreement." (Compl. Ex. D at 35.) *See Bennett*, 1993 WL 15603, at *3 (employer satisfied the opportunity to consult with counsel factor where the release stated that plaintiff had been given the opportunity to consult with counsel). *See also Leavitt*, 921 F.2d at 163 (opportunity to consult with counsel factor satisfied where the release advised plaintiff of his right to consult with an attorney, even though plaintiff chose not to do so). Sixth, Petitioner did not allege that he was denied an opportunity to negotiate the terms of the Release. *See Bennett*, 1993 WL 15603, at *3.

Finally, the consideration Petitioner received for executing the Release significantly exceeded that to which he was legally entitled. The Stockholders' Agreement entitled Petitioner to receive only ten percent of the total purchase price for his shares at closing with installment payments over a ten-year period. (*See* Compl. Ex. C § 6.01.) As consideration for executing the Release, Petitioner received rapidly accelerated payments: twenty-five percent at closing with installments paid over a three-year period. (Compl. ¶ 18, Ex. D at 2.) Petitioner's receipt of accelerated payments for his shares constitutes adequate consideration for the Release. Having satisfied all seven elements of the totality of the circumstances test, it is irrefutable that Petitioner knowingly and voluntarily released Respondents from any ERISA claims he may

have. Accordingly, even if the Plans were subject to ERISA, the Release bars Petitioner's claims.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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